

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P433/2015
PERMIT APPLICATION NO. WH/2014/1106

CATCHWORDS

Whitehorse Planning Scheme; Neighbourhood Residential Zone; Significant Landscape Overlay Schedule 2; Non-Residential Use (Child Care Centre) in Residential Zone; main road location; visual impact; neighbourhood character.

APPLICANT	Auscont Holdings Pty Ltd
RESPONSIBLE AUTHORITY	Whitehorse City Council
REFERRAL AUTHORITY	VicRoads
SUBJECT LAND	50-52 Blackburn Road, Blackburn
WHERE HELD	Melbourne
BEFORE	Michael Nelthorpe, Member
HEARING TYPE	Hearing
DATE OF HEARING	12 August 2015
DATE OF ORDER	19 August 2015
CITATION	Auscont Holdings Pty Ltd v Whitehorse CC [2015] VCAT 1277

ORDER

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act* 1998, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: The Ellis Group
 - Drawing numbers: Sheets TPA100, TPA101, TPA102, TPA200, TPA201, TPA500, TPA501, TPA502, Revision B
 - Dated: 3 July 2015
- 2 The decision of the Responsible Authority is affirmed.
- 3 In permit application WH/2014/1106 no permit is granted.

- 4 The Whitehorse City Council is required by the close of business on 28 August 2015 to file a written submission with the Tribunal and the Applicant for Review in response to the application for reimbursement of fees of \$986.40 made by the Applicant for Review.
- 5 The Applicant for Review may make a written submission in response to the Council's submission, in which case it must be filed with the Tribunal and the Whitehorse City Council by the close of business on 4 September 2015.
- 6 At any stage either party may request a further hearing to make further written and oral submissions in relation to the application for the reimbursement of fees.

Michael Nelthorpe
Member

APPEARANCES

For Applicant

Ms Tania Cincotta, solicitor of Best Hooper Lawyers.

She called the following witnesses:

- Ms Rebecca West, town planner of Urbis.
- Mr Simon Howe, landscape architect of John Patrick Pty Ltd; and
- Ms Charmaine Dunstan, traffic engineer of the Traffix Group.

An expert witness report of Mr Ross Moulynox, arborist of All Trees Consulting Services Pty Ltd was circulated prior to the hearing, however Mr Moulynox was not required to present his evidence.

For Responsible Authority

Mr Gintaras Simkus, town planner of Direct Planning.

For VicRoads

Ms Abir Chowdrey.

INFORMATION

Description of Proposal	A 104 place child-care centre within a two-storey building with 22 car spaces in the front setback.
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Zone and Overlays	Neighbourhood Residential Zone Schedule 7 Significant Landscape Overlay Schedule 2 The land abuts a road in a Road Zone Category 1.
Permit Requirements	Clause 32.09-1: to use land for a child-care centre; Clause 32.09-7: to construct a buildings and construct or carry out works associated with the use of the land for a child-care centre; Clause 42.03: to construct a buildings and construct or carry out works; and Clause 52.29: to create and/or alter access to a road in a Road Zone Category 1.
Relevant Scheme, policies and provisions	Clauses 11, 15, 21.05, 21.06, 22.04, 22.05, 32.09, 42.03, 52.29 and 65.
Land Description	The site is on the western side of Blackburn Road, one site south of its intersection with The Avenue. It is symmetrical in shape and consists of three unused tennis courts. A 32.92 metre frontage and 44.95 metre length yields an overall site area of 1490.7 square metres. A 1.83 metre wide easement is located along the rear boundary.
Tribunal Inspection	13 August 2015
Cases Referred To	<i>Zheng v Whitehorse CC</i> [2014] VCAT 1565

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Auscont Holdings Pty Ltd ('the Applicant') proposes to construct a 104 place child-care centre at 50-52 Blackburn Road, Blackburn. The Whitehorse City Council's failure to make a decision within the prescribed time precipitated this review.
- 2 Subsequently, the Council resolved that it would have refused to grant a permit. In the main, it considers the proposed buildings and works are incompatible with the neighbourhood's preferred character and desired landscape outcomes. Further to this, it considered the proposal was unacceptable due to its potential impact on existing trees on an adjoining property and the impact on the amenity of neighbouring properties.
- 3 In response, the Applicant circulated revised plans that sought to address the Council's concern for the existing trees on the adjoining property. At the hearing, the Council advised that these plans satisfied this concern.
- 4 The Applicant contends the proposal is an acceptable planning outcome. It relies on Ms West's expert opinion that the buildings, works and proposed landscaping appropriately respond to the site's context. Further to this, it says I must consider that:
 - a The Council does not oppose the use of the land for a child-care centre;
 - b The amenity of the site's neighbours is reasonably protected;
 - c VicRoads says Blackburn Road can accommodate traffic movements from the site²;
 - d The required number of on-site car spaces is provided; and
 - e No vegetation will be removed from the site.
- 5 At the end of the hearing, I advised that my initial impression was that the success or failure of the proposal turned on its response to its Blackburn Road frontage. Seeing the site and surrounding area confirmed this is the determinative matter in this review.
- 6 I give weight to the Applicant's submissions regarding the proposal's positive attributes as outlined above. Yet I find that, in addition to this, the proposal's buildings and works must acceptably respond to the site's context.

¹ I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I do not recite or refer to all of the contents of those documents in these reasons.

² VicRoads conditionally support the proposal.

- 7 I have decided to affirm the Council’s decision. I find the proposal’s response to the site’s frontage is not acceptable. It is inconsistent with the Planning Scheme’s objectives and guidelines relating to neighbourhood character and landscape outcomes. I make this finding notwithstanding the discretion policy provides for non-residential uses on sites such as this.
- 8 I elaborate on these reasons below.

IS THE PROPOSED RESPONSE TO THE SITE’S FRONTAGE ACCEPTABLE?

What is proposed

- 9 The proposed response to the site’s frontage comprises the following:
- 10 In site view, a landscaping strip occupies the first metre of the frontage with the exception of three-metre wide driveways near the north and south boundaries and four diamond cut-outs to accommodate trees. Car parking and an access way occupies the next 16.7 metres at ground level³ with the building’s first floor overhanging the inner band of car spaces⁴. A 1.2 metre wide landscape strip occupies the remaining space between the inner band of car spaces and the building’s wall. The overhanging first floor element comprises a play area with a minimum depth of 5.4 metres and the front section of the northern part of the building.
- 11 In elevation, a 3.25 metre high, brick clad ground floor sits beneath a 1.9 metre high, sycon matrix/glass balustrade around the overhanging play area. Above this is the recessive first floor, which is timber clad and has a low skillion roof. Each floor of the building has door and window openings.
- 12 In terms of landscaping, four Water Gums with under-storey groundcovers and grasses are proposed in the one-metre strip at the frontage, climbing plants are proposed to cover the fences in the beds along each side boundary and low-scale drought and shade tolerant plants are proposed for the 1.2 metre strip between the inner band of car spaces and the building’s wall.

The policy and planning controls framework

- 13 State planning policy at clause 15 is relevant to the proposed response to the frontage. Ms West’s summary is that these policies encourage ‘*community facilities of good design and which are respectful of neighbourhood character*’⁵.

³ Except for a 664mm landscape setback on the north boundary and a services/refuse/bicycle parking area on the south boundary.

⁴ Except for a 4.4 metre setback from the north side boundary and a 5.8 metre setback from the south side boundary.

⁵ Paragraph 15 of her Planning Evidence

- 14 Local planning policy at clause 22.05 ‘Non-Residential Uses in Residential Zones’ is relevant. This policy encourages such uses on main roads and in locations close to activity centres. It encourages buildings that ‘*harmonise with the housing styles and general character of the area*’⁶. It specifically discourage car parking at the front of the sites.
- 15 Local planning policy at clause 22.03 ‘Residential Development’ is relevant. At a minimum, it informs the ‘*general character of the area*’ referred to above. Alternately, it directly applies to the proposal⁷. Despite either view, it locates the site in a Limited Change Area and sets a preferred future ‘Bush Environment’ character for the Precinct containing the review site. This character is one where:
- streetscapes will be dominated by vegetation,...buildings will be surrounded by bush-like native and indigenous gardens...(and) buildings and hard surfaces will occupy a very low proportion of the site⁸.
- 16 In terms of planning controls, the site and surrounds are in the Neighbourhood Residential Zone, which allows non-residential uses and relevantly requires consideration of:
- The scale and intensity of the use and development;
- The design, height, setback and appearance of the proposed buildings and works;
- The proposed landscaping; and
- The provision of car parking and associated accessways⁹.
- 17 Finally, the site and surrounds are subject to the Significant Landscape Overlay Schedule 2, which relevantly seeks to:
- Ensure that a reasonable proportion of the lot is free of buildings to provide for the planting of tall trees in a natural garden setting; and
- Ensure that development is compatible with the character of the area¹⁰.
- 18 As Ms West correctly says, a permit is triggered under this control because of the proximity of the building to existing trees, the extent of hard paved

⁶ Clause 22.05-4.

⁷ This argument can be made because the lead paragraph of clause 22.03 states that policy applies to all applications for development within the Neighbourhood Residential, General Residential, Residential Growth, Mixed Use and Priority Development Zones. However, I consider this statement is anomalous with the overall direction of the policy as it is titled Residential Development and sets policy for new applications for dwellings and subdivisions at clause 22.03-3.

⁸ See clause 22.03-5.

⁹ See the decision guidelines at clause 32.09-11.

¹⁰ See the Landscape character objective to be achieved at clause 2 of Schedule 2.

area as it exceeds 17% of the site area¹¹, and the size of the first floor as it exceeds 25% of the site area¹².

Submissions, Evidence and Findings

- 19 I agree with Ms West that the site's location on a main road and its reasonable proximity to an activity centre mean it a preferred location under the policy. I also accept her opinion that the building's relatively small scale, two-storey height and semi-residential appearance allow it to be reasonably well absorbed in its setting.
- 20 I do not agree with Ms West that the level of landscaping proposed in the frontage is sufficient to screen the car parking area in the frontage. Having inspected the site, both on foot and by car travelling along Blackburn Road, I expect the car parking area will be the dominant visual element in the frontage. I expect the proposed trees, groundcovers and grasses will be observed as a narrow band of planting on the edge of a large parking area. I expect pedestrians will find the parking area highly visible and incongruous with neighbouring and nearby properties. I expect it will be noticeable and incongruous to drivers, particularly those travelling south past the site.
- 21 I disagree that there is space for '*sufficient landscaping commensurate with the landscape character of the area*'¹³. The paved area (hardstand and permeable) occupies over 600 square metres of the frontage, while the area set aside for landscaping occupies 40-50 square metres. This is a fatal imbalance of proportions. In numerical terms, 12 square metres of paving exists for each square metre of landscaping. Specifically, it is fatal in a setting where policy discourages parking in frontages and seeks a preferred character where '*buildings and hard surfaces occupy a very low proportion of the site*'. Further to this, it is fatal in a setting where the site area covered by hardstand and buildings must respond acceptably to the Overlay's objective to '*ensure that a reasonable proportion of the lot is free of buildings to provide for the planting of tall trees in a natural garden setting*'.
- 22 I am not persuaded that the nearby examples of parking in front setbacks assist in allowing the proposed response to be absorbed in its context. The landscape setbacks of the community centre and nearby dental clinic are in the order of 3 or more metres wide. This allows the planting of trees and/or shrubs that make a viable contribution to the neighbourhood's landscape character. Similarly, the church on the south side of The Avenue has setbacks deep enough to accommodate trees and shrubs. These greater

¹¹ Based on the John Patrick Landscape Plan and noting its use of permeable paving in the southern section of the car park and in the ground level children's play area, I estimate that 350 square metres of the 1490 square metre site is hard paved area. This equates to 23.4% of the site.

¹² Based on the Ellis Group architectural plans, the first floor including balcony occupies 630 square metres of the 1490 square metre site. This equates to 44% of the site.

¹³ See Paragraph 24 of her Planning Evidence.

setbacks allow for landscaping of some depth and a gentler transition to the parking areas. This contrasts sharply with the proposal, where Mr Howe recommends diamond cut-outs in the paving to accommodate trees. These cut-outs are only required because the landscape strip is not wide enough to accommodate trees¹⁴.

- 23 I acknowledge the Applicant's submissions that the Planning Scheme's policies and controls must be read in the site's context. I agree that the neighbourhood and landscape character varies across the Precinct and that Blackburn Road's character is different character to the quintessential Blackburn bush character of streets like Laurel Grove.
- 24 Nonetheless, I consider that the section of Blackburn Road between the activity centre and Canterbury Road retains a strong sense of its hinterland's bush setting. The road forms a corridor where established vegetation comprising canopy trees and shrubs dominates and buildings are subservient. I find the proposed narrow band of planting and large parking area does not reflect the Planning Scheme's objectives to maintain and/or enhance this setting.
- 25 At the hearing, I queried whether reducing the proposed number of car parking spaces to allow for additional landscaping was possible. Ms Dunstan helpfully addressed this issue. She said that 19, rather than the proposed 22, car spaces would acceptably meet the site's car parking demand given the site was well serviced by public transport. I accept her evidence. From this, it was perceived that landscape opportunities in the north-east and south-east sections of the frontage could be expanded.
- 26 I find this amendment to the plans would substantially improve the proposal yet would not make it acceptable. It would leave a minimum of six spaces and two driveways occupying the front band of car spaces and would not widen the one-metre landscape strip. As such, the configuration of the frontage would remain noticeable and incongruous to drivers and pedestrians because of the lack of generous landscaping in front of these spaces. Apart from this, it would not alter the extent of hardstand across the frontage in the accessway and band of spaces next to the building.
- 27 To date, I have focused on the ground level response to the frontage. I now turn to the first floor. The size of this floor triggers a permit under the Significant Landscape Overlay. I am not persuaded that this is an acceptable response to the Overlay's objective to '*ensure that a reasonable proportion of the lot is free of buildings to provide for the planting of tall trees in a natural garden setting*'. I accept there are reasonable plantings proposed in the children's play areas beside and behind the building yet there are no plantings reflective of a '*natural garden setting*' in the frontage. This is not possible because the design response is of ground

¹⁴ In saying this, I am not criticising Mr Howe's landscape plan

level parking and the first floor's overhanging form. I find this is not acceptable.

CONCLUSION

- 28 In conclusion, I consider that the response to the frontage is fundamentally flawed. It is premised on providing all parking required for a 104 space child care centre at grade in the frontage and on using this 'opportunity' to locate a large, overhanging first floor play area above it. This is unacceptable.
- 29 I consider that only 'tweaking' the design would be an unacceptable outcome. It may be that the requirements of a 104-space centre place too many spatial demands on the site. I cannot say this for certain, as we did not discuss these requirements at the hearing. However, I would not condone any reduction in the areas set aside for children's play and landscaping in return for an 'improved' frontage. The contribution of these areas to the Planning Scheme's neighbourhood character and landscape objectives is acceptable as they stand, yet may not be acceptable if they were simply reduced in size.
- 30 It may be possible to re-use some of this design concept in a future proposal for the site. However, the space set aside for landscaping at the front boundary in any future proposal must properly reflect the setback for planting on the community centre next door. I consider this level of contribution would be a starting point in a new design.
- 31 I am not persuaded that the recessive upper floor form suggested by the Overlay is required for a non-residential use on this site, however consider any variation from the Overlay's provisions must be counter-balanced by meaningful opportunities for the planting of tall trees in front of the building, aside from the front landscape setback. In saying this, I would not insist on applying the dimensions of unencumbered land in the local policy at clause 22.04¹⁵.
- 32 For the reasons explained above, the decision of the Responsible Authority is affirmed. No permit is to issue.

Michael Nelthorpe
Member

¹⁵ I refer the parties to the final dot point in paragraph 32 of the Tribunal's decision in Zheng v Whitehorse CC [2014] VCAT 1565 on this matter.